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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1071

Charles Bruce Marion

Petitioner

vs.

STATE OF ARKANSAS

Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS**

**BRIEF FOR RESPONDENT
IN OPPOSITION**

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-399

CHARLES BRUCE NABORS *Petitioner*

vs.

STATE OF ARKANSAS *Respondent***PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS****BRIEF FOR RESPONDENT IN OPPOSITION****OPINION BELOW**

The opinion of the Supreme Court of Arkansas is reported at 263 Ark. 409, 565 S.W. 2d 598 (1978) and is reproduced in the appendix to the petition for writ of certiorari at page 8.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Arkansas Statutes Annotated § 43-2001.2 (Repl. 1977), the text of which is set out in the appendix.

ARKANSAS CRIMINAL PROCEDURE RULE 17.4

RULE 17.4 Discretionary Disclosures.

(a) The court in its discretion may require disclosure to defense counsel of other relevant material and information upon a showing of materiality to the preparation of the defense.

(b) The court may deny disclosure authorized by this Article if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisal, or unnecessary annoyance or embarrassment, resulting from such disclosure, and that the risk outweighs any usefulness of the disclosure to defense counsel.

QUESTION PRESENTED

Whether the Confrontation and Compulsory Witness Clauses of the Sixth Amendment as applied to the states by the Fourteenth Amendment require the issuance of a subpoena duces tecum upon request of the defendant to discover the contents of the personnel records of a police officer witness without showing good cause therefor and for discovery purposes only.

ARGUMENT

Petitioner's sole contention in his petition for writ of certiorari is that a defendant in a criminal trial has a constitutional right to discover material in the hands of a third person without a showing of good cause and for discovery purposes only. The basis of this contention is that the essence of the Sixth Amendment right to confrontation of a witness is adequate cross-examination; that the Sixth Amendment also guarantees a criminal defendant the right "to have compulsory process for obtaining witnesses in his favor;" and that from the fundamental right of an accused to present witnesses in his own defense, an accompanying right to defensive evidence in the hands of third parties that *might* lead the defensive evidence can be inferred.

Respondent contends these allegations are without merit and that Petitioner was denied no constitutional rights under the Sixth or Fourteenth Amendments by the trial court's denial of his motion for a subpoena duces tecum.

97 C.J.S. Witnesses § 25(e) states, in relevant part:

Generally speaking, a subpoena duces tecum may be used to compel the production of any proper documentary evidence, such as books, papers, documents, accounts, and the like, which is desired for the proof of an alleged fact relevant to the issue before the court or officer issuing the subpoena, provided that the evidence which it is thus sought to obtain is competent, relevant, and material.

Petitioner, before the trial, requested a subpoena duces

tecum for the production by the police department of officer Rounsvall's personnel records, including all records of shooting incidents involving the officer. The basis for this request was the allegation that the personnel records might aid in attacking the credibility of Officer Rounsvall on cross-examination. (A. 7) Respondent points out, as did the Arkansas Supreme Court in its opinion, that petitioner's motion for subpoena duces tecum failed to even allege that Officer Rounsvall even had a past shooting record. Respondent submits this evidence would not have aided petitioner in proving his defense. Therefore, petitioner failed to show any relevancy or materiality to the issues adjudicated at trial concerning his guilt or innocence on the charges of interfering with a law enforcement officer, burglary, and theft of property. Petitioner's motion for a subpoena duces tecum did not show good cause and was in the nature of a fishing expedition. Therefore, it was properly denied.

People v. Coleman, 75 Misc. 2d 1090, 349 N.Y.S. 2d 298 (1973), also involved an application for the production of the personnel records of police officers. The Court, in denying the application, stated:

The use to which the defendant intends to make of the items which she would have us subpoena is the decisive factor in determining whether these applications should be granted. A subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence. (Citing cases) Where it is apparent that a party does not intend or cannot hope to offer testimony which refers to the items subpoenaed but merely seeks discovery and inspection his application should be denied. (Citing cases)

The Arkansas Supreme Court, in *Rodgers v. State*, 261 Ark. 293, 547 S.W. 2d 419 (1977), ruled that the defendant did not have the right to discover the personnel records of an officer-witness. The applicable discovery statute in Arkansas is Arkanstat Statutes Annotated § 43-2011.2 et seq. (Repl. 1977); such statute does not require that counsel for petitioner be allowed to inspect Officer Rounsvall's personnel file. (A. "A")

There are valid policy reasons for maintaining confidentiality of personnel records of prospective witnesses. See: *People v. Coleman, supra*.

It has been held, in many jurisdictions, that the issuance of a subpoena duces tecum is a matter within the sound discretion of the Court in which the case is pending. There was no abuse of discretion in this case. Petitioner was afforded an opportunity to become as informed about the trial as was the State, and was allowed to discover any discoverable information. The discretionary disclosures allowed under Arkansas Rules of Criminal Procedure, Rule 17.4, were afforded or denied by the trial court, and there was no abuse of discretion.

Respondent would point out the fact that petitioner was fully afforded his right to cross-examination of Detective Rounsvall. (T. 105-114) A witness may be impeached by proof of a criminal conviction or by inquiry into his reputation for truth and veracity as well as any past vicious, immoral or criminal conduct. Petitioner could have asked Rounsvall or his superior about any past shooting record, or could have called other witnesses to testify as to Rounsvall's reputation for truth and veracity.

The trial court's denial of petitioner's motion for issuance of a subpoena duces tecum in no way tainted any of petitioner's constitutional rights.

CONCLUSION

For the foregoing reasons and authorities, the respondent prays that petitioner's application for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joyce Williams Warren, Assistant Attorney General, do hereby certify that a copy of the foregoing Brief for Respondent In Opposition has been served upon petitioner by placing three (3) copies of the same in the United States mail, postage prepaid, to the Honorable Russell Reinmiller, Attorney at Law, 805 W. 29th Street, North Little Rock, Arkansas, 72114, attorney for the petitioner, on this 21st day of November, 1978.

JOYCE WILLIAMS WARREN
Assistant Attorney General

APPENDIX "A"

43-2011.2. Discovery and inspection of documents. — [a]

Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney, and (3) recorded testimony of the defendant before a grand jury.

(b) Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photographs books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the State, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule [this section] does not authorize discovery or inspection of reports, memoranda, or other internal state documents made by state agents in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses (other than the defendant) to agents of the state except as provided in Section 3 [§ 43-2011.3] of this Act [§§ 43-2011.1 — 43-2011.4].

(c) If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule [this section], it may, upon motion of the state, condition its order by requiring that the defendant permit the state to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the state's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case or of statements made by the defendant, or by state or defense witnesses, or by prospective state or defense witnesses, to the defendant, his agents or attorneys.

(d) An order of the court granting relief under this rule [this section] shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the state the court may permit the state to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera the entire text of the state's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) A motion under this rule [this section] may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule [this section]. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) If, subsequent to compliance with an order issued pursuant to this rule [this section], and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule [this section], he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of (the) the court that a party has failed to comply with this rule [this section] or with an order issued pursuant to this rule [this section], the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances. [Acts 1971, No. 381, § 2, p. 927.]